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No. 88-1592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN R. WILSON, *ET AL.*,
Cross-Petitioners,

v.

THE OMAHA INDIAN TRIBE,
Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether the question of *res judicata* precludes the Court's consideration of the issues presented in the Cross-Petition of Lakin, Wilson, R.G.P., Inc., *et al.*, by reason of these facts:

(1) Cross-Respondent Omaha Indian Tribe and Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*, joined issue by their pleadings in the case of *Omaha v. Wilson*, C 75-4067, and fully tried both the issues of fact and law respecting their claims to title to the 6390 acres of land of which the Blackbird Bend Meander Lobe is comprised;

(2) The district court, in its *Blackbird Bend I* decision entered the "basic finding essential" to Cross-Petitioners' case that (a) the Blackbird Bend area had been totally washed away and (b) totally replaced by accretions to the Iowa riparian land;

(3) The Court of Appeals in OMAHA I reversed the "basic finding essential" to Cross Petitioners' case, declaring that the finding was clearly erroneous and not supported by evidence; and

(4) The Court in *Wilson v. Omaha* affirmed the decision in OMAHA I that Cross-Petitioners pursuant to 25 U.S.C. 194, had failed to sustain their burden of proving that the Blackbird Bend lands to which they claimed title are accretions to the Iowa riparian bank and that they derived their titles from the owners of that riparian land?

Whether Cross-Petitioner Iowa (88-1636), having expressly admitted and Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*, having impliedly admitted that Evan L. Hultman, as Attorney General for the

State of Iowa, had participated in a "quiet-title suit" among Cross-Petitioner Iowa and Cross-Petitioners Lakin and Peterson (R.G.P., Inc.) involving the "same area" of the Blackbird Bend Meander Lobe concerning which Evan L. Hultman forced his representation upon Cross-Respondent Tribe, the Court should not first resolve the issue of fraudulent representation of the Tribe prior to considering the issue of the Constitutionality of 25 U.S.C. 194?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed:

John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATUTORY PROVISIONS AND RULES INVOLVED	4
STATEMENT OF THE CASE	5
INTRODUCTION	5
PARCEL I AND PARCEL II DEFINED FOR CLARITY	6
FINDINGS AND DECISION PERTAINED TO ENTIRE BLACKBIRD BEND AREA	8
PARCEL II BARRETT MEANDER LINE LAND	10
The Pre-Trial April 5, 1976, *Sua Sponte* Order Must Comport with the Evidence in the Case	12
Cross Petitioners Place in Issue Title to "Fee Patented" Lands Denied to Tribe by Evan L. Hultman, United States Attorney	15
Court of Appeals Effectively Abrogated the Court's *Wilson v. Omaha* Decision	17
THE PRINCIPLES OF *RES JUDICATA* FORECLOSE RECONSIDERATION OF THE VALIDITY OF 25 U.S.C. 194	19
CONGRESS EXERCISED ITS CONSTITUTIONAL AUTHORITY RESPECTING INDIAN AFFAIRS	22

Hypocrisy Is the Hallmark of the Cross-Petition 24

CONCLUSION 29

TABLE OF AUTHORITIES

	Page
Arizona v. California, 373 U.S. 564, 599-601 (1963)	23
Brandon v. Holt, 469 U.S. 464, 471 (1985)	14
Bryan v. Itasca County, 426 U.S. 373, 376, n.2 (1976)	23
Dean Foods Co. v. Albrecht Dairy Co., 396 F.2d 652 (CA 8, 1968)	13
McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172, n.7 (1973)	23
Morton v. Mancari, 417 U.S. 535, 551-553 (1974)	23
Omaha v. Wilson, 575 F.2d 620, 622, (CA 8, 1988)	*passim*
RE: *U.S. v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson*, 524 F.Supp. 874 (U.S.D.C.N.D. Iowa W.D. 1981)	*passim*
Seminole Nation v. United States, 316 U.S. 286, 297 (1944)	24
Shelley v. Union Oil Co., 203 F.2d 808 (CA 9, 1956)	13
Shoshone Tribe v. United States, 299 U.S. 476, 497-498 (1967)	24
United States v. Wilson, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977)	*passim*
United States v. Wilson, 433 F.Supp. 67, 88 para. V. (U.S.D.C. W.D. 1977)	*passim*
United States v. Wilson, 707 F.2d 304, 309 (CA 8, 1982)	*passim*
United States v. Wilson, 578 F.Supp. 1191, 1193 (U.S.D.C.N.D. Iowa W.D. 1984)	*passim*
Vogrin v. Hedstrom, 220 F.2d 863 (CA 8, 1955) cert. den. 350 U.S. 845 (1955)	13
Winters v. United States, 207 U.S. 564, 576-577 (1908)	23

Table of Authorities Continued

Page

STATUTES

Constitution of the United States, Article I, Section 8, Clause 2 22

25 U.S.C. 194 ..... *passim*

MISCELLANEOUS

Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R 15(b)," Sec. 15-13[1]. p. 15-119 13

Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45 14

Rule 15(b), Federal Rules of Civil Procedure 13

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Respondent Omaha Indian Tribe respectfully opposes the Cross-Petition filed by John R. Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, R.G.P., Inc., and Otis Peterson seeking to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States District Court for the Northern District of Iowa entered its Memorandum Opinion on January 13, 1984,[1] holding that Petitioner Omaha In-

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[1] Appendix A, *United States v. Wilson; Omaha v. Jackson, et al.; Omaha v. Agriculture* (hereafter referred to as Omaha v. Wilson) 578 F. Supp. 1191 (U.S.D.C.N.D. Iowa W.D. 1984), p. 5a.

dian Tribe could not prevail against the State of Iowa as to any lands claimed by Respondent Iowa or concerning fee-patented lands claimed by private Respondents. That Memorandum Opinion is Appendix A of this Petition. Subsequently the District Court, on May 29, 1987, entered its Final Judgment and Decree, which was amended June 30, 1987.[2] That Final Judgment and Decree is Appendix B of this Petition. Petitioner Omaha Indian Tribe appealed the Memorandum Opinion (Appendix A) and the Final Judgment and Decree (Appendix B) to the United States Court of Appeals for the Eighth Circuit. That Court of Appeals rendered its opinion on August 12, 1988.[3] That Opinion is Appendix C of this Petition. On November 10, 1988, the Court of Appeals entered its Order denying the Petition for Rehearing *en banc*. That Order is Appendix D of this Petition.[4] On January 18, 1989, the Supreme Court entered an Order extending the time to file this Petition to and including February 28, 1989. That Order of the Supreme Court is Appendix E of this Petition.[5] In addition to the Opinions and Final Judgment referred to above there are these Opinions, Findings of Fact, and Conclusions of Law to which reference is necessary in

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[2] Appendix B, Final Judgment and Decree, May 29, 1987, *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson;* Order June 30, 1987, Amending Final Judgment and Decree, p. 16a.

[3] Appendix C, *Omaha Indian Tribe v. Jackson; Omaha v. . . . Wilson*, 854 F.2d 1089 (CA 8, 1988), p. 37a.

[4] Appendix D, Order dated November 10, 1988, p. 49a.

[5] Appendix E, Order of Supreme Court dated January 18, 1989, p. 50a.

determining the grounds of the Final Judgment and the Opinions of the courts below:

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing en banc was entered November 10, 1988, and the period for filing was extended by the Court to and including February 28, 1989.[7] The Court's ju-

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[5] Opinion of the District Court, dated September 4, 1981, declaring that Petitioner Omaha Indian Tribe had proved its valid claim to title to the 700 acres involved against Respondent Iowa and Respondents Lakin, et al. That Opinion is Appendix F of this Petition: Re: *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agriculture* . . . Wilson, 523 F.Supp. 874 U.S.D.C.N.D. Iowa W.D. 1981). On June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix H of this Petition: *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix I of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978). The Court of Appeals, Appendix I, reversed the District Court's Opinion declaring that the Respondents had sustained their burden of proof against Petitioner Tribe. That Opinion of the District Court was entered May 4, 1977 and is Appendix J of this Petition: *United States v. Wilson*, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977). The Court of Appeals Opinion, Appendix I, likewise reversed the Findings of Fact and Conclusions of the District Court, which found as a fact and concluded as a matter of law that Petitioner Tribe had failed to sustain its burden of proof. That district Court's Findings of Fact and Conclusions of Law are Appendix K of this Petition: *United States v. Wilson*, 433 F.Supp. 67 (U.S.D.C.N.D.Iowa W.D. 1977).

[7] *See*, Appendices D and E.

risdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

RULE 15(b), Federal Rules of Civil Procedure

(b)Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the

presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

STATEMENT OF THE CASE
INTRODUCTION

Antecedent to addressing the specific issue of the Constitutionality of 25 U.S.C. 194, it is essential first to define and to clarify the precise status of the litigation originally before the Court resulting in the decision of *Wilson* v. *Omaha*. Reference in that regard is made to the fact that Cross-Respondent Omaha Indian Tribe, by its Petition in 88-1426, reviews in specific detail the fact that there was fully tried in the district court in Cross-Respondent's case of *Omaha* v. *Wilson* the title to the full 6390 acres involving the Blackbird Bend Meander Lobe.[8]

As part of Cross-Respondent Tribe's case in chief in *Omaha* v. *Wilson*, Tribe proved by unchallenged evidence that title to lands within the "Barrett Survey Meander Line" totalling 306 acres of fee patented lands claimed here by Cross-Petitioners Lakin, Wilson, and R.G.P., Inc., *et al.*, resides in Cross-Respondent Tribe by reason of the fact that those approximately 306 acres are and for all periods of time relevant to these proceedings were accretions to

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[8] Pet. No. 88-1426, p. 9; Cross-Respondent Tribe's Quiet Title Action, *Omaha v. Wilson*.

Cross-Respondent Tribe's trust lands and that the title resides in the Tribe to those lands today.[9]

Under the present final decree, those approximately 980 acres [referred to by the Court and the Court of Appeals as 700 acres] of land have been apportioned between the State of Iowa and Cross-Petitioners on this basis:

State of Iowa	672.93 acres
Other Cross-Petitioners	306. acres[10]

PARCEL 1 AND PARCEL 2 DEFINED FOR CLARITY

In an effort separately to present the issues in the two Cross-Petitions and to avoid confusing the issues, Cross-Respondent Tribe refers to Parcel 1 and Parcel 2 and the decisions which pertain to them:

PARCEL 1: This tract encompasses the full 6390 concerning which Petitioner Tribe in its complaint in *Omaha* v. *Wilson*, C 75-4067 sought to quiet title against Cross-Petitioners Lakin, Wilson, R.G.P. Inc., *et al.*, and Cross-Petitioner Iowa to the full 6390 acres comprising the Blackbird Bend Meander Lobe.[11]

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[9] *Ibid.*, 88-1426, p. 7. Throughout the Petition, Petitioner Tribe has referred to approximately 700 of land which are accretions to Tribe's trust lands. However in the June 29, 1987 Final Judgment and Decree title to approximately 306 acres, to which Hultman had denied Petitioner Tribe's title, was awarded to Cross-Petitioners Lakin, et. al., No. 88-1592, and 672.93 acres were awarded to Cross-Petitioner Iowa, No. 88-1636.

[10] *See*, Cross-Petition, No. 88-1592, p. 6; *see*, also Cross-Petition State of Iowa, No. 88-1636, p. 6-9.

[11] Pet. App., Appendix O, p. 269a, p. 272a.

PARCEL 2: Is comprised of the approximately 980 acres of land proved by Cross-Respondent Tribe to be accretions to Tribe's trust lands, title to which Evan L. Hultman, United States Attorney, in the complaint in *United States* v. *Wilson* denied Tribe's title to those lands, largely for the benefit of Mr. Hultman's former client, State of Iowa, but also for the benefit of Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*,[12]

In the trial on the merits, Cross-Petitioner Lakin, Wilson, R.G.P. Inc. *et al.*, joined issue with Petitioner Tribe involving the full 6390 acres in Parcel 1, denied Cross-Respondent Tribe's title to that land and counterclaimed against Cross-Respondent Tribe in regard to their respective tracts of land within the 6390 acres.[13]

In the trial on the merits, Cross-Respondent Omaha Indian Tribe, having joined issue with the Cross-Petitioner Lakin, Wilson, and R.G.P., Inc. *et al.*, offered its proof of title in the district court to the full 6390 acres in PARCEL I, the Blackbird Bend Meander Lobe. There were no objections to Cross-

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[12] Pet. p. 7-11.

[13] Pet. App., Appendix CC, Answer and Counterclaim of R.G.P., Inc., P. 378a, 379a-380a, para. 8. *Note*: Allegations in CC, para. 8 are identical with those which were omitted in printing in BB, p. 376a-377a, Answer and Counterclaim of Wilson, *et al.*

Respondent Tribe's proof as to either its oral, documentary, or demonstrative evidence.[14]

Cross-Petitioners Lakin, Wilson, and R.G.P., Inc. *et al.*, likewise without any objections offered full proof of their respective claims to title to the 6390 acres devoting a vast preponderance of their evidence in their unsuccessful effort to prove that the Blackbird Bend Meander Lobe was comprised of accretions to the Iowa riparian bank.[15]

FINDINGS AND DECISION PERTAINED TO ENTIRE BLACKBIRD BEND AREA

It is most relevant here that the decision of the district court, Blackbird Bend I, pertained to the full 6390 acres.[16] Equally relevant is the fact that the Court of Appeals in OMAHA I referred to "the basic finding essential to the defendants' case is the trial court's statement" that the Barrett Survey land had been "washed away" and that "new land" was added to "Iowa riparian land" within the Blackbird Bend Area.[17] Moreover, the Court of Appeals in OMAHA I reversed that "basic finding" essential to

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[14] Pet., p. 9, *et seq.*, On p. 10 there is graphically displayed the area containing 6390 acres to which Cross-Respondent Tribe's evidence pertained.

[15] Ibid.

[16] Pet., p. 13-14; Pet. App., Appendix K, p. 205a, 245a, in which the district court found that the Blackbird Bend Meander Lobe and concluded: "V. The original Omaha Indian Reservation within the 1867 Barrett Survey has subsequently been washed away . . . and that at the same time new land was added to the Iowa riparian bank . . . within the Blackbird Bend Area . . . ."

[17] Pet., P. 13-14. Pet. App., Appendix I, *Omaha v. Wilson*, p. 135a, 167a.

Cross-Petitioner's claim to title declaring that the finding was "clearly erroneous and not supported by substantial evidence."[18] Additionally, and most relevant here, the Court of Appeals in OMAHA I, applying 25 U.S.C. 194, declared that the burden of proof resided with Cross-Petitioners to establish their counterclaims that the Blackbird Bend Meander Lobe had been washed away and was replaced by accretions to "the Iowa riparian land."[19] Based upon that decision in OMAHA I, the Court of Appeals declared that Cross-Respondent Tribe was entitled to judgment to only 1900 acres, not the 6390 acres claimed by Cross-Respondent Tribe in *Omaha* v. *Wilson*.

The Court granted Cross-Petitioners' request for review as to, among other things:

> Whether the Eight Circuit erroneously construed Title 25 U.S. Code 194 to make it applicable in this case.[20]

After a full review of the issue of the applicability of 25 U.S.C. 194, the Court declared that Cross-Petitioners Lakin, Wilson, and R.G.P., *et al.*, not only had the burden of proof but also the burden of persuasion and made this most relevant declaration as to the issues to which *Wilson* v. *Omaha* pertained:

> Petitioner [Cross-Petitioners here] argued that the river had gradually eroded the reservation lands on the west bank of the river, and *that the disputed land on the east bank,*

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[18] *Ibid.*

[19] Pet.App., Appendix I, p. 135a, 154a, 155a, 167a; *see*, Pet. p. 14.

[20] Pet. App., Appendix H, p. 107a, 113s, 118a, n.13.

> *in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.*[21]

It is manifest that the Court in *Wilson* v. *Omaha*, the district court in *Blackbird Bend I*[22] and the Court of Appeals in *OMAHA* I[23] did not limit their decisions to the Barrett Survey land, but rather rendered those decisions predicated upon the counterclaims of Cross-Petitioners who asserted in their pleadings and sought to prove that the Blackbird Bend Meander Lobe, and that part of the Meander Lobe within the Barrett Survey Line were accretions to the Iowa riparian bank. Most importantly here is that the Court in *Wilson* v. *Omaha* affirmed the decision of the Court of Appeals in *Omaha I* that the Cross-Petitioners had failed to sustain their burden of proving their "basic findings essential" to Cross Petitioners' claim to title that the lands in question were all accretions to the Iowa riparian land, affirming judgment in Cross-Respondent Tribe.

Of necessity, the opinions of the three Courts pertain to lands both *outside* and *within* the Barrett Survey Line, as graphically displayed in Plates I and II of Tribe's Petition.[24]

PARCEL II
BARRETT MEANDER LINE LAND

Contrary to fact, Cross-Petitioners Lakin, Wilson, and R.G.P., Inc., *et al.*, make this erroneous statement:

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[21] *Ibid.*, p. 115a. (Emphasis supplied).

[22] *Supra.* p. 2.

[23] *Supra.* p. 4.

[24] Pet., p. 7-11.

> The critical factual issue in the case was whether the Missouri River moved over an area, referred to as the Barrett Survey, in an avulsive or accretive manner at various times since 1854.[25]

Initially, as reviewed above respecting PARCEL I, the area involved in the litigation was not limited to the "Barrett Survey"; rather, the "Barrett Survey" was but a small part of the area litigated, all as graphically displayed by the decisions of the Appellate Court and the district court.[26] The River movement, either accretive or avulsive, did not and could not relate to the Barrett Meander Line which was a momentary high-water mark of the Missouri River in 1867. As stressed in the Petition, the Barrett Meander Line was not a boundary.[27] The boundary line is well stated by the Court in these terms:

> The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg.[28]

In 1867 the "center of the main channel of the Missouri River"—which was the boundary line between the State of Iowa and the Omaha Indian Reservation—was far removed from the transitory high-water line meandered by Barrett in 1867.

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[25] Cross-Petition, Wilson, Lakin, and R.G.P., Inc., p.3.

[26] *See*, OMAHA I, Plates I, II, III, and IV, Pet.App., Appendix I, p. 135a, 142a, 143a, 144a; *Blackbird Bend II*, Pet.App., Appendix F, p. 52a, 54a, 65a.

[27] Pet., p. 11.

[28] Pet. App., Appendix H, P. 107a, 114a.

There are additional grave errors in that statement. As reviewed above, the "factual issue in the case" is not how the Missouri River moved across the constricted "Barrett Survey"; rather the issue that was fully tried by all parties, and adjudicated by the courts, as reviewed above, is whether, as contended by the Cross-Petitioners, the Barrett Meander Line was comprised of accretions to the Iowa riparian land. It was determined by the Court of Appeals in OMAHA I that Cross-Petitioners had failed to sustain the burden placed upon them by 25 U.S.C. 194.

A critical element of Cross-Petitioners' error in declaring that the litigation was constricted to the "Barrett Survey" is the fact that the district court, having fully tried the issues respecting 6390 acres of which the Blackbird Bend Meander Lobe is comprised, could limit the judgment to the lands within the Barrett Meander Line predicated upon the pretrial order of April 5, 1976, which purported to limit the issues to the Barrett Meander Line.[29]

The Pre-Trial April 5, 1976 Sua Sponte Order Must Comport with the Evidence in the Case

Cross-Petitioners would have the Court ignore the fact that the entire trial on the merits pertained to the full 6390 acres of land comprising the Blackbird Bend Meander Lobe rather than in conformity with the 1976 pretrial *sua sponte* Order[30] that purported to limit the trial to the "Barrett Survey." The Cross-Petitioners, in seeking to limit the case to the lands within the "Barrett Survey," avoid reference to the

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[29] *See*, Pet. p. 9, *et seq.*; 12, *et seq.*

[30] Pet. App., Appendix GG, P. 403a, first para.

fact, as reviewed above, that they pleaded and undertook to prove that the entire Blackbird Bend Meander Lobe comprising 6390 acres was washed away and replaced by accretions to the Iowa riparian land. It is the *record* in the case—the oral, documentary, and demonstrative evidence—to which the April 5, 1976 *sua sponte* pretrial order must conform—not the converse, as urged by Cross-Petitioners.

Repeatedly the courts have declared, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, that where, as here, the evidence offered by all parties and received into the record without objection, the parties are bound by the issues actually tried irrespective of the pretrial order.[31] The precedents uniformly hold that where, as here, issues which were not stated in a pretrial order, but evidence was nevertheless offered without objection, the pretrial order is considered to have been amended to be in conformity with the proof offered in the trial on the merits.[32]

Moore has stressed that pretrial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure should be read in light of Rule 15(b).[33] In addition, *Moore* reviews in detail an abundance of authority which holds that pretrial orders are to be

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[31] *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (CA 8, 1968).

[32] *Shelley v. Union Oil Co.* 203 F.2d 808 (CA 9, 1956); *see*, also *Vogrin v. Hedstrom*, 220 F.2d, 863 (CA 8, 1955) *cert.den.* 350 U.S. 845 (1955).

[33] Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R.15(b)," Sec. 15-13[1]. p. 15-119, *et seq.*

amended to conform with the evidence received into the record either by express agreement or implied approval based upon failure to object. In the Court's decision of *Brandon et al.*, v. *Holt*[34] there is reviewed in comprehensive detail the principle that the proof in the record is controlling over pleadings and pretrial orders.

The concepts enunciated above must surely have application to the *sua sponte* pretrial order which was totally ignored at the trial on the merits and which must be set aside to comport with the pleadings and proof in the record offered by all parties, Petitioner Tribe and Respondents alike, which proof related to the entire Blackbird Meander Lobe, and not to the constricted "Barrett Survey," as argued by Cross-Petitioners. The Court, in the *Brandon* decision, cites Rules 15(b) and the authorities which have applied that Rule which was designed " 'to avoid the tyranny of formalism.' " It has been authoritatively stated that the procedures provided for Rule 15(b).

> . . . are intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action [the *sua sponte* order] and later proved to be erroneous.[35]

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[34] 469 U.S. 464, 471 (1985).

[35] Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45.

Cross-Petitioners Place in Issue Title to "Fee Patented" Lands Denied to Tribe by Evan L. Hultman, United States Attorney[36]

Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*, refer to their claim of title "to approximately 300 acres of fee patent land."[37] By that claim to title to the "fee patent land," there is placed in issue whether Cross-Respondent Tribe can be bound by the "forced fraudulent" representation by Evan L. Hultman who, as United States Attorney, forced his representation upon the Tribe and denied Tribe's title in *United States* v. *Wilson* to the "fee patent land."[38]

As part of Cross-Respondent Tribe's case in chief, which was directed primarily to Tribe's claim to the 6390 acres in the Blackbird Ben Meander Lobe, proof was offered to establish that the "fee patent lands," concerning which Evan L. Hultman denied Tribe's title, had been totally obliterated and completely replaced by accretions to Tribe's trust land.[39] In *Blackbird Bend II*[40] the district court found as a fact that:

> Individual defendants, [Cross-Petitioners here] as well as the State of Iowa, claimed title to the 'fee patented' lands .... The Tribe, however, proved defendants never possessed the actual land described in the fee patents because the river obliterated and

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[36] Pet., p. 7, *et seq.*

[37] Cross-Petition, p. 6, second paragraph.

[38] Pet., p. 7-11.

[39] Pet., P. 14-15.

[40] Pet.App., Appendix F, p. 52a, 80a.

> eroded the fee lands prior to defendants entry thereupon.[41]

Predicated upon those facts and contrary to the claim to the "fee patented" land, the district court rejected the claims of Cross-Petitioners making the following statement:

> This Court finds and concludes, however, the Tribe established by a preponderance of the evidence that the river eroded the lands in the western Barrett Survey area, including those described in the fee patents, and replaced those lands with accretions and relictions to trust lands . . . .[42]

title to which resides in Cross-Respondent Tribe.

It is most relevant here, on the background of Cross-Petitioners attack upon the Constitutionality of 25 U.S.C. 194, that the district court, on the subject of 25 U.S. 194, declared:

> Even if 25 U.S.C. § 194 did not apply and the Tribe had the burden of proof, this Court holds the Tribe established by a clear preponderance of the evidence its right and claim to the land occupying the area described in the fee patents.[43]

From that express ruling by the district court, awarding to Cross-Respondent Tribe title to the accretions to the trust lands, which had replaced the "fee patent" lands, Cross-Petitioners appeals and that

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[41] *Ibid.*

[42] *Ibid.*, p. 80a.

[43] *Ibid.*, n. 19.

appeal gave rise to OMAHA III divesting Cross-Respondent Tribe of its title to those lands.[44]

Court of Appeals Effectively Abrogated the Court's *Wilson v. Omaha* Decision

The Court of Appeals in OMAHA III acknowledges the district court's findings and conclusions that ". . . the fee-patented land was completely washed away by the post-1923 western movement of the river" and reemphasized that fact by stating "it is undisputed that" the "fee patented lands" claimed by Cross-Petitioners Lakin, et al., are accretions to Cross-Respondent Tribe's trust lands but declared, nevertheless—relying on *Wilson* v. *Omaha*—it is believed in total error, that:

> We deem this fact not significant. It is the *area* of land now occupied by the landowners that is important. *See, Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 668 . . . .[45]

The magnitude of the conflict between the Court of Appeals' OMAHA III decision and *Wilson* v. *Omaha* is clearly defined by these quoted excerpts from the Court's decision:

> . . . § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute . . . .
>
> Section 194 is triggered once the Tribe makes out a prima facie case of prior pos-

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[44] Pet., p. 15, *et seq.*

[45] Pet.App, Appendix G, p. 93a, 99a-103a. (Court's emphasis).

> session or title to the particular area under dispute.[46]

By its opinion, the Court of Appeals has effectively abrogated the Court's opinion in *Wilson* v. *Omaha*. To interpret *Wilson* v. *Omaha* as awarding title to "the landowners" who are occupying the land at the time of the trial is clear violation of the Court's opinion. It is manifest that the Court of Appeals had great difficulty in rationalizing away Tribe's title to the accretions to Tribe's trust lands. To justify its denial of Tribe's proven title to the accretions to the trust lands, the Court of Appeals, in error, declared that the only means pursuant to which title to those lands could be acquired by the Tribe was by an avulsion across the Barrett Survey land.[47]

It is incredible that the Court of Appeals should thus construe 25 U.S.C. 194 as denigrating the quality of Cross-Respondent Tribe's title to the trust lands by denying Tribe the right to accretions to those trust lands. Accretions are an invaluable property right, one of the natural attributes of title. In Horn-Book Theory, the Court of Appeals, in grave error, has denied that the Tribe has title to one of the sticks in the bundle of rights constituting fee simple title.

In denying Tribe the accretions which are part and parcel of the trust lands and recognizing title in Cross-Petitioners to the nonexistent fee patent lands, the Court of Appeals violated the most elemental principles of real property law recognized, enunciated, and applied by the district court in these terms:

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[46] Pet.App., Appendix H, p. 107a, 122a-123a.

[47] Pet. App., Appendix G, p. 92a, 102a.

> In both Nebraska and Iowa, the effect of such a movement of the river is to destroy the title to the land obliterated by the movement of the river. *State* v. *Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Winkle* v. *Miters*, 195 Neb. 821, 241 N.W.2d 329 (1976); *Rupp* v. *Kirk*, 231 Iowa 1387, 4 N.W.2d 264 (1942); *Wilcox* v. *Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). This court cannot, therefore, apply state laws of adverse possession or laches based upon the former title to the lands in fee patent. Application of those laws if at all, must be based upon the present character of the title to the accretions.[48]

THE PRINCIPLES OF *RES JUDICATA* FORECLOSE RECONSIDERTION OF THE VALIDITY OF 25 U.S.C. 194

A full decade ago the Court in *Wilson* v. *Omaha* declared in specific terms the principles sustaining the Constitutionality of 25 U.S.C. 194 which the Court stated was within the purview of the Congressional authority to enact legislation to protect the rights and interests of Cross-Respondent Omaha Indian Tribe. On the subject the Court declared:

> Because of recurring trespass upon and illegal occupancy of Indian territory a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions.

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[48] Pet.App., Appendix F, p. 52a., 81a.

The Court reemphasized the protection of Indian Tribes against non-Indian squatters by declaring that:

> "It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made by non-Indian squatters on their lands.[49]

In applying 25 U.S.C. 194, it is evident that the Court was seeking to rectify the failure of the Trustee over a long period of time from acting on behalf of the Tribe against the squatters. In its injunctive order of June 5, 1975, the district court took cognizance of the fact that, although the Tribe had been forced out of possession for a great many years, the Tribe had never abandoned its claim to the land. On the subject, the district court declared:

> The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course.[50]

Moreover, when the district court denied the efforts of the Department of Justice to seize and take from the Tribe its "profits" from the farming operation, the district court rejected that effort, declaring:

> The Tribe will not be penalized for the government's failure for approximately 50 years

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[49] Pet.App., Appendix H, p. 107a, 119a-120a.

[50] Pet.App., Appendix M, p. 256a, 260a.

> to promptly seek quiet title to the trust lands.[51]

Reference is warranted to the fact that the Court of Appeals in OMAHA IV—irrespective of the abundance of sound precedents to the contrary—permitted the Department of Justice to seize and take the Tribe's profits from its farming operations.[52]

That harsh and unreasonable decision of the Court of Appeals is a critical issue in Tribe's petition for a writ of certiorari.

The Court in *Wilson v. Omaha* affirmed that application of 25 U.S.C. 194,[53] as declared by the Court of Appeals in OMAHA I, in which that court denied Cross-Petitioners' title on the basis that they had failed to sustain their burden of proof that the lands which they are occupying are accretions to the Iowa riparian land.[54]

Predicated upon the Court's determination that 25 U.S.C. 194 placed the burden upon Cross-Petitioners to prove their title, Cross-Petitioners—having failed to sustain that burden of proof—are now precluded by the concept of *res judicata* to retry that issue. It is of great importance as reviewed above, that the record in the case—the oral, documentary, and demonstrative evidence offered by all parties, Cross-Respondent and Cross-Petitioner alike—pertained to the 6390 acres and that litigation should not be retried, as ordered by the Court of Appeals. Those prin-

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[51] Pet.App., Appendix B, p. 16a, 35a.

[52] Pet.App., Appendix C, p. 37a, 44a.

[53] Pet.App., Appendix H, p. 107a, 116a-119a.

[54] Pet.App., Appendix I, p. 135a, 167a.

ciples of *res judicata* respecting the title to the full 6390 acres are applicable irrespective of the fact that the April 15, 1976 pretrial *sua sponte* order purported to constrict the issues to the "Barrett Survey."[55]

CONGRESS EXERCISED ITS CONSTITUTIONAL AUTHORITY RESPECTING INDIAN AFFAIRS

Congress was well within its Constitutional authority when it enacted 25 U.S.C. 194. Cross-Petitioners failed to cite a single authority that would place in question the Constitutionality of 25 U.S.C. 194.

It is essential at the outset clearly to establish that when Congress enacted 25 U.S.C. 194 it was exercising a specific Constitutional authority which, among other things, declared that:

> Congress shall have power. . . .; To regulate commerce with foreign nations and among the several states and with the Indian Tribes.[56]

In the exhaustive review of Congressional power over Indian Affairs and the legal consequences flowing from Cross-Respondent's Treaty of 1854, the Court made this statement:

> The source of federal authority over Indian matters has been the subject of some confusion, but is now generally recognized that the power derives from federal responsibility

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[55] *Supra.*, p. 12, *et seq.; see* Pet. p. 23, *et seq.*, for principles of *res judicata.*

[56] Constitution of the United States, Article I, Section 8, Clause 3.

> for regulating commerce with Indian tribes and for treaty making. *See*, Const. Art. I, s8, Cl.3; Art. II, § 2, cl.2.[57]

Numerous decisions applying the Constitutional concepts that Congress has plenary power and control of Indian Affairs to preserve and protect Indian rights, titles, and interests of the character here involved support Cross-Respondent Tribe in asserting that 25 U.S.C. 194 is a valid exercise of Congressional authority when Indian Tribes are confronted, as here, with powerful political, non-Indian claimants.[58]

The Court's Opinion in *Wilson v. Omaha* enunciated the basic precepts of the law respecting statutory interpretations which are governing here:

> ". . . 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 80 (1918)."[59]

As Trustee for the Omaha Indian Tribe, the United States has the unique power, authority, and obligation

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[57] *McClanaham v. Arizona State Tax Commission*, 411 U.S. 164, 172, n.7 (1973).

[58] *Bryan v. Itasca County*, 426 U.S. 373, 376, n.2 (1976); *Arizona v. California*, 373 U.S. 564, 599-601 (1963); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *Morton v. Mancari*, 417 U.S. 535, 551-553 (1974).

[59] Pet.App.., Appendix H, p. 107a, p. 120a.

to preserve and protect the rights and interest of American Indian Nations, Tribes, and People.[60]

On the background of those broad Constitutional powers and the obligation of the Trustee United States, reference is made to the gravamen of the Tribe's Petition for Certiorari which establishes beyond controversy that agents of the United States Trustee "sold out" the interests of the Tribe and did so while acting in concert with the Cross-Petitioners.[61]

Hypocrisy Is the Hallmark of the Cross-Petition

Cross Petitioners have the termerity to assert that:

> The Indian plaintiffs have been able to enlist the vast resources of the United States, Department of Justice. . . . The United States, in fact, is the original plaintiff and brought suit on behalf of the Tribe.[62]

The case of *United States v. Wilson* prepared and filed by attorneys in the Justice Department, over the unvarying protests of Cross-Respondent Tribe, had as its objective from the moment of its inception the constriction of the Tribe's claims to 6390 acres within the Blackbird Bend Meander Lobe to 1900 acres within the Barrett Meander line. The attorneys in the Department of Justice knew that the Blackbird Bend Meander Lobe was a unitary tract of land which could only properly be tried as a single unit. Rather than claiming the full 6390 acres, those attorneys (a) denied petitioner Tribe's claim to several hundred acres

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[60] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1944); *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1967).

[61] Pet., p. 7-11.

[62] Cross-Petition, p. 17.

of land—980 acres—; (b) intentionally abandoned valid claims to 3400 acres of land outside of the illusory Barrett Meander Line; and (c) constricted the Tribe's claim to 1900 acres as distinguished from the valid claim of 6390 acres made by the Tribe on its own behalf in *Omaha v. Wilson.*[63]

The constricted complaint prepared and filed by the Myles E. Flint, attorney, and Evan L. Hultman, United States Attorney, Department of Justice, is a classic example of the agents of the Trustee rather than utilizing those "vast resources of the United States"[64] for the benefit of the Tribe, instead fraudulently connived with the Cross-Petitioners to defeat the Tribe and have intentionally "sold out" the Tribe's interests for the benefit of Cross-Petitioners, who have the audacity to seek equity in the courts.[65]

It is undenied and undeniable that attorneys for the Cross-Petitioners communicated directly with and exchanged information with Myles E. Flint and other attorneys in the Department of Justice and attorneys in the Department of the Interior antecedent to the formulation and filing of the fraudulent complaint in *United States v. Wilson.*[66]

It is charged here that Thomas R. Burke, Counsel for Cross-Petitioner Wilson, *et al.*, communicated directly with both the attorneys in the Departments of Justice and Interior and was unquestionably instru-

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[63] Pet., p. i, first question; p. 6-11.

[64] Cross-Petition, p. 17.

[65] Pet. P. i, first question; p.. 6-11; p. 18 *et seq.*

[66] Pet., p. 6, *et seq.*; Pet. App., Appendix W, p. 337a, 351a, 352a, *et seq.*

mental in the formulation and filing of the corrupt complaint in *United States v. Wilson.*[67]

Magnitude of Cross-Petitioners' attempt to dissemble and pervert the facts, and to ascribe to 25 U.S.C. 194 their hypocritical assertions that Cross-Petitioners have been victimized in this statement:

> The application of 25 U.S.C. s 194 has produced in this case precisely the kind of irrational result which might be expected when a case is decided on the basis of who the litigants are rather than upon the truth of their claims.[68]

It is then declared that:

> (a) Iowa will retain ownership of its land because of Section 194 does not apply to it;
>
> (b) Cross-Petitioners will retain the fee patent land because Section 194 does not apply within this 'area';
>
> (c) Cross-Petitioners will lose the rest of the land because they are 'white persons' and Section 194 applies to them.[69]

Short shrift may be made of the sophistry in which Cross-Petitioners have engaged in the above-quoted excerpts:

(a) Cross-Petitioner Iowa has title to land within the Blackbird Bend Area by reason of the fact that Evan L. Hultman, as United States Attorney, in filing

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[67] *Ibid.*

[68] Cross-Petition, p. 17.

[69] *Ibid.*, p. 17-18.

the constricted, fraudulent complaint in *United States v. Wilson* denied Tribe's title to the precise lands which Mr. Hultman, as Attorney General, had obtained for Cross-Petitioner Iowa in earlier litigation. Those lands were, moreover, proven by Cross-Respondent Tribe to be accretions to Tribe's trust lands, Tribe having established its title by a clear preponderance of the evidence without the aid of 25 U.S.C. 194.[70] It was Evan L. Hultman's fraud—not 25 U.S.C. 194—that vested title in Cross-Petitioner Iowa.

(b) Cross-Petitioners declare that they retain title to the "fee patent land" because Section 194 does not have application to the [fee patent] "area." The "fee patent land" awarded to Cross-Petitioners is directly attributable the fraudulent denial by Evan L. Hultman of Cross-Respondent Tribe's title in the complaint in *United States v. Wilson*. Once again, 25 U.S.C. 194 was not remotely involved.[71] Additionally the Tribe, in its Petition, seeks to have reviewed the clearly erroneous determination by the Court of Appeals that Cross-Petitioners are entitled to those lands because they are now occupying them. That clear violation of the Court's opinion in *Wilson v. Omaha* is a critical issue concerning which Cross-Respondent Tribe seeks review, all as set forth in its Petition.[72]

(c) Finally Cross-Petitioners, continuing the facetious assault on 25 U.S.C. 194, assert that they will lose "the rest of the land" because they are "white

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[70] Pet. p. 14-15.

[71] *Ibid.*

[72] *Ibid.*, p. 15 *et seq.*

persons." Cross-Petitioners refuse to acknowledge that the Court of Appeals in OMAHA I declared that, after Cross-Petitioners had a full and fair opportunity to prove their title based upon the alleged accretions to the Iowa riparian land, they failed totally in their efforts.[73] The failure of Cross-Petitioners was that they were unable to overcome the actual physical fact that the Blackbird Bend Meander Lobe is not and never was an accretion to the Iowa riparian land. Rather it was a single unitary tract of land which had been severed from the Tribe's Reservation by avulsions away from the 1875 and 1912 abandoned channels of the Missouri River, and most assuredly not by reason of 25 U.S.C. 194.

Cross-Respondent Tribe rejects out of hand Cross-Petitioners' assertion that the expert witnesses on "both sides" were forced to engage in "educated guesses."[74] It is unquestionably true that Cross-Petitioners' expert, Dr. Hallberg, admitted on cross-examination, that his expert opinions were "educated guesses."[75] Most assuredly Cross-Respondent Tribe's witnesses did not, nor was it necessary for them to engage in "educated guesses." In that regard reference is made to the fact that all of the Plates extensively utilized by both the district court and the Appellate Court were copies of Tribe's exhibits, admitted into evidence at the trial on the merits based upon the testimony of Tribe's well-qualified experts.[76]

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[73] Pet. p. 9, *et seq.*; p. 23 *et seq.*

[74] Cross-Petition, p. 11, n. 14.

[75] Cross-Petition, p. 11, n. 14.

[76] Pet.App., Appendix I, OMAHA I, p. 135a, 142a-144a; Appendix F, *Blackbird Bend II*, p.. 52a, 58a-65a.

CONCLUSION

Cross-Respondent Omaha Indian Tribe refers to the question set forth initially in this brief in opposition in which the issue is presented as to whether Cross-Petitioners Lakin, Wilson, R.G.P., Inc., *et al.*,—having been active participants in and beneficiaries of the fraud practiced upon the Tribe—are entitled to be heard in regard to their misinterpretation of 25 U.S.C. 194, prior to having resolved the issue of forced, fraudulent representation of the Tribe which permeates all aspects and phases of these proceedings.

Respectfully submitted,

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